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No. 396

In the Supreme Court of the United States

OCTOBER TERM, 1948

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (II R. 40) is reported at 169 F. 2d 324. The opinion of the District Court (I R. 143) is reported at 70 F. Supp. 202. The opinion of the Court of Appeals dismissing a prior appeal for want of a final judgment is reported at 163 F. 2d 940.

JURISDICTION

The judgment of the Court of Appeals was rendered August 3, 1948 (II R. 47). The petition for writ of certiorari was filed October 30,

1948. The jurisdiction of this Court is founded on the provisions of Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether, in the absence of a federal license, the appointment of a permanent receiver by a state court can confer on the receiver title to assets which had previously been frozen pursuant to Section 5(b) of the Trading with the Enemy Act and Executive Order No. 8389.

2. Whether, under the provisions of Section 977-b of the New York Civil Practice Act, the petitioner acquired title to the assets of the Austrian association by virtue of his appointment as temporary receiver.

3. Whether the federal district court was precluded from adjudicating the respective claims of the petitioner and the Alien Property Custodian to a fund in the hands of a third party, by reason of the fact that the petitioner's claim was based on his appointment as receiver by a state court.

STATUTE INVOLVED

The relevant partions of Section 5(b) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 55 Stat. 839; 50 U.S.C. App. Section 5(b) are set out in the Appendix (infra, p. 13).

STATEMENT

This action was begun on April 22, 1946, in the District Court for the Southern District of New

York by the Alien Property Custodian[1] to enforce certain portions of a vesting order (Vesting Order No. 2097, 1 R. 112-5) by which the Custodian had vested all rights of various named European societies under copyrights for the performance of musical compositions. The complaint (I R. 5), in three counts, alleged that certain royalties were owing by the defendant, American Society of Composers, Authors and Publishers (hereinafter referred to as "ASCAP") to three of the societies named in the vesting order and sought the payment to the Custodian of those royalties. The second count of the complaint, with which alone the present petition for writ of certiorari is concerned, claimed royalties allegedly owing to an Austrian cooperative association, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten and Musikverleger (hereinafter referred to as "A.K.M."). That count named the petitioner as a co-defendant, alleging that he had made claim to the funds. The complaint prayed that the court adjudge that the Custodian had by virtue of the vesting order acquired full title to the indebtedness of ASCAP to A.K.M., that the petitioner had no title superior to that of the Custodian, and that the Custodian recover judgment against ASCAP for the royalties claimed.

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[1] Tom C. Clark, Attorney General as Successor to the Alien Property Custodian was duly substituted for James E. Markham, as Alien Property Custodian (I R. 150). The term "Custodian" will be used herein to refer to the original or the substituted plaintiff as the context may indicate.

On motions for judgment on the pleadings or for summary judgment filed by petitioner (I. R. 70) and the Custodian (I R. 92), the District Court, on February 10, 1947, entered a judgment declaring that petitioner has no right, title or interest to the funds which were the subject of the second count (I R. 153). Thereafter judgment was entered against ASCAP on November 21, 1947, directing it to pay over to the Custodian the amount of $46,839.54 (II R. 25). On appeal by the petitioner the judgments of the District Court were affirmed unanimously by the Court of Appeals on the merits (II R. 40).[2]

The facts relating to the petitioner's claim of title to the indebtedness which was the subject matter of the second count are as follows. On June 12, 1941, on ex parte application by a creditor of A.K.M., the Supreme Court for New York County, acting pursuant to Section 977-b of the Civil Practice Act of New York, appointed the petitioner temporary receiver of the assets in New York of A.K.M. (I R. 49). Two days later, on June 14, 1941, Executive Order No. 8389 (5 F.R. 1400) was amended to include Austria and nationals of Austria among those whose property was subject to freezing controls (Executive Order No. 8785, 6 F. R. 2897, Appendix, p. 15, infra).

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[2] This was the second appeal by petitioner, an earlier appeal having been dismissed as premature, 163 F. 2d 940, ASCAP having stipulated to the entry of the judgment against it, did not appeal.

No license has been applied for or issued permitting petitioner to engage in any transaction involving property of A.K.M. (I R. 110).

On September 29, 1941, petitioner was appointed permanent receiver of A.K.M. (I R. 56). Petitioner has reduced no assets to possession and has made no disposition to creditors (I R. 95). An action in the New York courts against ASCAP to recover the sums allegedly owed by it to A.K.M. was instituted by him on July 29, 1941 (I R. 96). Its disposition is awaiting outcome of the present proceeding (I R. 117-123).

DISCUSSION

I. The petitioner contends that he acquired title to the New York assets of A.K.M., including the fund here in suit, by his appointment as permanent receiver. We think the court below was clearly correct in holding that because the fund had been frozen by Executive Order No. 8389 more than three months prior to petitioner's appointment, that appointment was ineffective to confer on petitioner any right to the fund.

Executive Order No. 8389 was issued pursuant to Section 5(b) of the Trading with the Enemy Act, as amended May 7, 1940, 54 Stat. 179, 50 U.S.C. App. Sec. 5(b). Its text (Appendix p. 15), patterned directly on that of the statute, is unequivocal. It prohibits, unless licensed, all "transfers" or "dealings in" any "evidences of indebtedness" if the prohibited transactions in-

volve property in which a "national" of a country designated in the order has an interest. There can be no dispute that A.K.M. was such a "national" and that the acquisition of title by petitioner to an evidence of indebtedness (ASCAP's books of account and the indebtedness to A.K.M. shown thereon) in which A.K.M. had an interest was prohibited by the Order.

Petitioner apparently does not dispute that the Executive Order would have prevented ASCAP from making a voluntary transfer of the indebtedness to a third person; his argument is that a transfer of title by court order (the order appointing him permanent receiver) is exempt from the prohibitions of the Executive Order. As the Court of Appeals pointed out (II R. 45), there could be no conceivable reason for creating such an obvious loophole in the statutory scheme, which was designed to immobilize all foreign assets except as transfers of those assets were permitted by appropriate federal license. And there is no warrant in the terms of the Order for reading into it such an exception. Any possible doubt on the point, moreover, is removed by General Ruling No. 12, issued by the Secretary of the Treasury on April 21, 1942 (7 F. R. 2991, Appendix p. 15, infra). That Ruling explicitly declares that any transfers of blocked (i.e., frozen) property after the effective date of the Order are prohibited; it defines property as including "debts" and "claims" and defines "trans-

fer" as including any "judgment . . . or other judicial or administrative process or order". And paragraph 4 of the Ruling specifically provides that no attachment, judgment or other judicial process shall confer any greater right in blocked property than could be created by voluntary act.[3]

Although we believe that the decision of the Court of Appeals is clearly correct, we do not oppose the petition in so far as it seeks review on this point. The question of the effectiveness of an unlicensed transaction which comes within the prohibitions of Executive Order No. 8389 is one of fundamental importance under the Trading

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[3] The petitioner's further arguments—that the decision below denies full faith and credit to the judgments of the New York Supreme Court and destroys vested rights of the petitioner and others in the debt—assume the point to be decided. The judgments of the New York Supreme Court do not purport to be an adjudication that title to the present debt had passed to the petitioner, or to confer any rights on the petitioner which he could not lawfully acquire under the federal freezing regulations. In the absence of the most explicit language to the contrary, those judgments should be construed as being in conformity with the applicable federal regulations, which under the supremacy clause of the Constitution, Art. VI, Cl. 2, formed part of the law of New York. In any event, a judgment in violation of the freezing regulations would not be binding on the federal court. Cf. *Kalb* v. *Feuerstein*, 308 U. S. 433.

Similarly, the argument that the petitioner or third parties had acquired liens in the debt by virtue of the receivership proceeding or of the subsequent action brought by petitioner against ASCAP in the state courts necessarily assumes that property interests could be created in the debt after the effective date of Executive Order No. 8389.

It should be pointed out that the judgment below will not deprive creditors of A.K.M. of an opportunity to satisfy their claims out of the debt here in question or out of any other United States asset of A.K.M. See Trading with the Enemy Act, Sec. 34; 60 Stat. 925, 50 U.S.C. App. Sec. 34; *Cabell* v. *Markham*, 69 F. Supp. 640 (S.D.N.Y.).

with the Enemy Act. It has arisen in a wide variety of cases in various jurisdictions,[4] and the decisions have not been uniform. In particular, the state courts of New York[5] apparently adhere to views which are divergent from those which have been adopted by the court below. See e.g. *Singer* v. *Yokohama Specie Bank*,[6] 293 N.Y. 542, 58 N.E. 2d 726; *Leeds* v. *Guaranty Trust Co.*, 65 N.Y. Supp. 2d 431, affirmed, 272 App. Div. 909, affirmed, 297 N.Y. 1019. Their view apparently rests either on the notion that the Executive Order merely prohibits payment or physical de-

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[4] In addition to the cases cited at pp. 15-16 of the petition, see e.g. *Okihara* v. *Clark*, 71 F. Supp. 319, 322-3 (D. Hawaii, 1947); *The Kotkas*, 35 F. Supp. 983 (E.D.N.Y.); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.*, 76 F. Supp. 335 (S.D.N.Y.); *Clark* v. *Chase National Bank, et al.*, decided Oct. 1, 1948 (S.D.N.Y.); *Heyden Chemical Co.* v. *Clark*, decided Oct. 15, 1948 (S.D.N.Y.); *Blank* v. *Clark*, 79 F. Supp. 373 (E.D.Pa.). And see generally Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947); Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemp. Problems, 17, 44-9 (1945); Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N.Y.L.J. 2180, 2200 (1945).

[5] The views adopted by the New York state courts are particularly important because of the great volume of litigation relating to the freezing controls which has arisen within the geographical boundaries of that state—a reflection of the centralization there of international banking and financial business.

[6] The *Singer* case is again before the New York Court of Appeals after trial, motion for leave to appeal having been granted on October 7, 1948. Counsel for the New York Superintendent of Banks have requested the New York Court to reconsider its prior decision in the light of the express refusal of the court below to follow it (II R. 45). The United States, in a brief *amicus curiae*, has joined in that request.

livery of blocked property but does not prohibit transfers of ownership to such property, or that transfers by judicial order are excepted from the prohibitions of the federal freezing regulations. Neither notion finds any support in the text of the Executive Order or the regulations and rulings thereunder, and acceptance of either would seriously impair the effectiveness of the federal controls. Accordingly, we believe that it would be desirable to have this Court review the question at the present time in order to resolve the apparent conflicts of judicial decision which have developed.

II. The petitioner argues further that he acquired title to the fund by his appointment as temporary receiver two days prior to the effective date of Executive Order No. 8389 and hence that his claim to the fund is unaffected by that Order. His contentions on this point raise only questions of the construction of a state statute which do not merit review by this Court. The holding of both courts below that a temporary receiver appointed in an ex parte proceeding under Section 977-b of the New York Civil Practice Act does not take title to any assets is in accordance with the statutory language and consistent with the general rule applicable in New York as to temporary receivers. The petition alleges no conflict with any decision of the New York courts and we have found none. The petitioner's further contention that his subsequent appointment as permanent

receiver conferred upon him a title which related back to the date of his appointment as temporary receiver also finds no support in the language of the statute or in any decision of the New York courts. Even if it did, we cannot perceive how such a relation back could be effective in the face of the intervening freezing of the assets of A.K.M. If the petitioner had no title to those assets on the date when Executive Order No. 8389 became effective, any subsequent judicial act which purported to give him such title would be a transfer of blocked property prohibited by Executive Order No. 8389.

III. The petitioner further contends that the courts below should not have entertained jurisdiction of the action, on the theory that the proceedings below constituted an unwarranted interference with the possession of assets in the custody of the New York receivership court within the rule of such cases as *United States* v. *Bank of New York Co.*, 296 U. S. 463.

The difficulty with this argument is that it assumes that the assets are in the possession or control of the petitioner as receiver. On the contrary, they are held by a third party—ASCAP. The Custodian has sought, as is his unquestioned right, the aid of the federal courts to enforce an order under the Trading with the Enemy Act. Trading with the Enemy Act, Sec. 17, 40 Stat. 411, 50 U.S.C. App. Sec. 17; *Markham* v. *Allen*, 326 U. S.

490. He joined the petitioner only because the petitioner was asserting a claim to the same assets. He has never sought a judgment requiring the petitioner or any other officer of the state court to pay anything over to him, and the judgment here appealed from does not do so.

The position of the Custodian here is even stronger than it was in *Markham* v. *Allen*, *supra*. There the federal courts undertook to determine ultimate rights in a fund actually in the hands of and being administered by a state court. Here the federal courts have determined rights of the Custodian to a fund in the hands of a third party. The suggestion is untenable that because another claimant to that fund happens to be a state receiver the federal courts are deprived of jurisdiction over this federal cause of action. Cf. *Fischer* v. *American United Ins. Co.*, 314 U. S. 549.[7] Accordingly, this question also does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, limited to the question whether the petitioner acquired any title to the debt in suit by his appointment as permanent

[7] Indeed, the state courts have recognized that the federal court is the appropriate forum. Petitioner's independent proceeding in the state courts to require ASCAP to pay the debt over to him has been held in abeyance because those courts held themselves without power to render any decision affecting the Custodian's title to the debt. *Propper* v. *Taylor*, 270 App. Div. 890.

receiver effective September 29, 1941, and in all other respects the petition should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General,
DAVID L. BAZELON,
Assistant Attorney General,
JAMES L. MORRISSON,
Attorney.

DECEMBER, 1948.

Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any in-

terest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * *

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U.S.C. 1 et seq:

* * * * *

SEC. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5.

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise; and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any

acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

* * * * *

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by

the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transation for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

SEC. 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

* * * * *

(j) June 14, 1941—

* * * * *

Austria

* * * * *

SEC. 5.

* * * * *

E. The term "national" shall include,

* * * * *

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country

and/or one or more nationals thereof as herein defined.

* * * * *

General Ruling No. 12, April 21, 1942, 7 F.R. 2991:

(a) Unless licensed or otherwise authorized by the Secretary of the Treasury, (1) any transfer after the effective date of [Executive Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (2) no transfer af the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

* * * * *

(d) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in

a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(e) For the purposes of this general ruling:

(1) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; *Provided, however,* That the term

"transfer" shall not be deemed to include transfers by operation of law.

(2) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

* * * * *

By direction of the President.